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# Due Process in School Discipline: The Effect of Goss v. Lopez

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# DUE PROCESS IN SCHOOL DISCIPLINE: THE EFFECT OF *GOSS v. LOPEZ*

## INTRODUCTION

The importance of education has long been recognized in the United States. It has been suggested that the right to public education is a "fundamental" right[1] and few would disagree that the value of a high school diploma is a *sine qua non* of economic prosperity, if not economic survival.[2] In recent years, courts have been faced with the question of whether there does in fact exist a right to receive a public education, and when and under what circumstances can the right be withdrawn. The withdrawal or deprivation of access to education may take many forms, *i.e.*, racial discrimination, poverty, geographical or linguistical barriers. One form receiving a great deal of attention of late is school discipline in the form of suspension or expulsion of the student from school.

The authority vesting school administrators with the power to discipline students has deep roots. This power stems from both statutes[3] and from what the courts have termed inherent power.[4]

> It has always been within the province of school authorities to provide by regulation for the prohibition and punishment of acts calculated to undermine the school routine—such authority is necessary and proper.[5]

The cases discussing the school's power to discipline have repeatedly focused on two main issues: does the due process clause of the

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1. Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 604 (1971), *cf.* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

2. Sullivan v. Houston Independent School Dist., 333 F. Supp. 1149, 1172 (S.D. Tex. 1971), *vacated*, 475 F.2d 1071 (5th Cir. 1973).

3. *See, e.g.*, OHIO REV. CODE § 1313.66 (1974).

4. *See, e.g.*, Tate v. Bd. of Educ. of Jonesboro, Ark., Special School Dist., 453 F.2d 975 (8th Cir. 1972), where the court held school authorities have inherent authority to maintain order and hence have latitude and discretion in formulating rules and regulations and general standards of conduct.

5. Banks v. Bd. of Pub. Instruc. of Dade County, 314 F. Supp. 285, 289 (S.D. Fla. 1970), *vacated*, 401 U.S. 988 (1971) (for entry of a fresh decree so that a timely appeal might be taken), *aff'd*, 450 F.2d 1103 (5th Cir. 1971).

fourteenth amendment apply to education and if so, what procedural steps must be taken by school authorities to satisfy due process. Some courts[6] have been reluctant to face the first issue head on. Instead they have chosen to "assume *arguendo*" that it did apply and then proceed to deal with what steps were necessary to satisfy the due process clause. Courts which have faced the question of whether the due process clause applies to school disciplinary hearings have held both ways.[7] Until recently, the United States Supreme Court had declined to hear the issue.[8]

This changed, however, with the Court's five to four decision in *Goss v. Lopez*,[9] where the Court held that the due process clause does apply to school disciplinary proceedings.[10] This Comment will analyze *Goss* and compare it with the case law developed in the lower courts. The *Goss* decision dealt only with short term suspension of students; however, the importance of long term suspension and expulsion warrants discussion with *Goss*. While the school discipline issue affects all forms of educational instruction from the elementary level to the college and university level, this Comment is limited to elementary and secondary educational institutions.

## DUE PROCESS AND SCHOOL DISCIPLINE

Any discussion of school discipline in light of the due process clause must begin with an understanding of the type of interest protected by the due process clause. The fourteenth amendment provides in part: "No state shall deprive any person of life, liberty, or property, without due process of law."[11] There is little doubt

6. *See, e.g.*, Tate v. Bd. of Educ. of Jonesboro, Ark., Special School Dist., 453 F.2d 975 (8th Cir. 1972); Farrell v. Joel, 437 F.2d 160 (2d Cir. 1971).

7. For those holding the due process clause applied to school disciplinary proceedings *see* Strickland v. Inlow, 485 F.2d 186 (8th Cir. 1973), *vacated* and *remanded*, 95 S. Ct. 992 (1975); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961); De Jesus v. Penberthy, 344 F. Supp. 70 (D. Conn. 1972). Those finding the due process clause did not apply, *see* Murray v. West Baton Rouge Parish School Bd., 472 F.2d 438 (5th Cir. 1973); Dunn v. Tyler, 460 F.2d 137 (5th Cir. 1972).

8. *See, e.g.*, Linwood v. Bd. of Educ., City of Peoria, 463 F.2d 763 (7th Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

9. 95 S. Ct. 729 (1975).

10. *Id.* at 737.

11. U.S. CONST. amend. XIV, § 1.

that school disciplinary proceedings constitute state action within the terms of the fourteenth amendment.[12] Given state action, whether any procedural protection is due depends on the nature of the interest involved. The interest must be one within the contemplation of "liberty" or "property" language of the fourteenth amendment.[13]

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.[14]

While the right to education is not a fundamental right under the United States Constitution,[15] the right to education may still receive due process protection. Forty-eight states have provisions in their constitutions for public education. The same states have compulsory attendance laws which require school attendance for eight years or more.[16] These states have voluntarily created a right to education. As Mr. Justice Marshall stated in his dissent in *San Antonio Independent School District v. Rodriguez*,[17] no other state function is so uniformly recognized. With the states having enacted these compulsory attendance laws, it would appear the student has a "legitimate claim of entitlement to" education. Accordingly, he should be entitled to protection of this state-created right under the due process clause.[18]

The United States Supreme Court has not defined with exactness the "liberty" guaranteed by the fourteenth amendment but has held:

> [I]t denotes not merely freedom from bodily restraint but also the right of the individual to contract, . . . to acquire useful knowledge, . . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.[19]

Under this broad definitional pronouncement and with the claim to education a student possesses under state law, it has been held that the right to public education is both a "liberty"[20] and a

12. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954); West Virginia State Bd. of Educ. v. Barnett, 319 U.S. 624, 637 (1943), where the Court held "[t]he fourteenth amendment, as now applied to the states, protects the citizen against the state itself and all its creatures—boards of education not excepted." *See also* Bouse v. Hipes, 319 F. Supp. 515 (S.D. Ind. 1970).
13. Fuentes v. Shevin, 407 U.S. 67 (1972).
14. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
15. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).
16. *Id.* at 112 n.68 (dissenting opinion).
17. 411 U.S. at 1. *See* text accompanying notes 67-71 *infra.*
18. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).
19. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
20. Lopez v. Williams, 372 F. Supp. 1279 (S.D. Ohio 1973), *aff'd*, 95 S.

"property"[21] interest requiring due process protection.

The determination of whether school suspension or expulsion proceedings pass constitutional muster involves a two-step analysis. The first step is to determine whether the right affected by the school proceeding is a protected right under the Constitution. This determination does not involve a weighing process.[22] If the right affected is a "liberty" or a "property" right, due process protection in some form is required before that right can be withdrawn. "[W]hether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake."[23] In light of the fundamental character of the entitlement to education[24] it can be well said that the right to education is constitutionally protected.

The second step of the analysis involves the resolution of what procedure is necessary to satisfy due process. At this point the weighing process is proper.[25] With respect to what will satisfy the due process clause, all aspects of procedural due process have been discussed in school discipline cases including a student's right to counsel,[26] the right of confrontation and cross-examination of adverse witnesses,[27] notice of specific charges,[28] and the right to appeal.[29] One basic question, however, lies at the center of this controversy and that is whether a hearing is necessary before the

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Ct. 729 (1975).

21. Farrell v. Joel, 437 F.2d 160 (2d Cir. 1971).

22. In discussing the nature of the right to education some courts have relied on a balancing test to resolve the question of whether due process has any application to school discipline. The court in Banks v. Bd. of Pub. Instruc. of Dade County, 314 F. Supp. 285 (S.D. Fla. 1970), held it was important to weigh and contrast the gravity of rights involved with the interest of the state in maintaining discipline in the education system. The court's reliance on the balancing test is misplaced: it is immaterial what the gravity of the right is so long as the right is one found either to be a "liberty" or a "property" right.

23. Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972).

24. *See* text accompanying notes 11-21 *supra.*

25. *See* note 22 *supra.*

26. Madera v. Bd. of Educ. of City of New York, 386 F.2d 778 (2d Cir. 1967).

27. De Jesus v. Penberthy, 344 F. Supp. 70 (Conn. 1972).

28. Williams v. Dade County School Bd., 441 F.2d 299 (5th Cir. 1971).

29. Linwood v. Bd. of Educ., City of Peoria, 463 F.2d 763 (7th Cir. 1972) *cert. denied*, 409 U.S. 1027 (1972).

student is suspended or expelled. There is general agreement among the courts that a distinction exists, with respect to what procedure will satisfy due process, between expulsion or long-term suspension[30] and short-term suspension.[31] In expulsion cases modern courts have uniformly held some type of hearing is necessary.[32] Students facing suspension have not found this same uniformity with respect to a hearing prior to their suspension.

The leading case until *Goss* dealing with the due process issue in school was *Dixon v. Alabama State Board of Education.*[33] While *Dixon* dealt with a college student, it has been cited as authority in numerous elementary and secondary school cases. In *Dixon,* the court was faced with the expulsion of a black college student for participating in a "sit-in" at a white lunch counter. There was no notice of the school's intention to expel nor was there a hearing regarding it. The court held the due process clause applied to expulsion from the state college and went on to state that "the minimum procedural requirement necessary to satisfy due process depends upon the circumstances and the interest of the parties involved."[34] The *Dixon* court considered the relative interest of the student on the one hand and the college on the other and found that the power of the government to expel is not unlimited and cannot be arbitrarily exercised. The possibility of arbitrary action is not excluded by the existence of reasonable regulations. There may be arbitrary application of the rule to the facts of a particular case, such a result is inevitable when the board hears only one side of the issue.[35]

The court then set forth the following five standards which it felt would decrease the possibility of arbitrary decisions and afford the student minimum due process protection:

1. Notice of specific charges and grounds against the student.
2. A hearing, the nature of which should vary depending upon the circumstances of the particular case.
3. The student should be given the names of the witnesses against

30. Expulsion is a final separation from an institution, and suspension is a temporary one. John B. Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1924). The phrase short-term suspension is used in reference to separation from school for ten days or less.

31. Lee v. Macon County Bd. of Educ., 490 F.2d 458 (5th Cir. 1974), where the court stated that "[w]hen a serious penalty is at stake a school board must provide a higher degree of due process than when the student is threatened only with a minor sanction." *Id.* at 460.

32. *See, e.g.,* De Jesus v. Penberthy, 344 F. Supp. 70 (D. Conn. 1972).

33. 294 F.2d 150 (5th Cir. 1961), *cert. denied,* 368 U.S. 930 (1961).

34. *Id.* at 155.

35. *Id.* at 157.

him and an oral or written report on the facts to which each witness testifies.
4. The student should be given an opportunity to present his own defense against the charges.
5. If the hearing is not before the Board directly, the results and findings of the hearing should be presented in a report open to the student.[36]

These standards while varied to certain degrees in the cases following *Dixon,* have nonetheless formed the basis of the due process law with respect to school disciplinary hearings. The *Dixon* standard requiring a hearing left the nature of the hearing to be determined by the facts of each individual case. Much of the litigation in this area has been directed at this issue: given the facts, was the "hearing" provided adequate?[37]

## THE HEARING

A hearing should serve two functions. First, it should determine whether or not the student in fact did the act he is alleged to have committed. Second, it must designate the appropriate discipline in light of the offense committed.

The hearings employed by various schools range from a willingness to answer questions from the students after they were informed they had been suspended[38] to a "full-dress" formal hearing with counsel present.[39] Whether a student receives a formal hearing or an informal conference and whether the type of hearing provided will satisfy due process in a particular case depends on two factors. The factors arise out of the hearing's functions and create a floating scale due process.[40] The first is that the greater the degree to which the material facts surrounding the event are in dispute the more extensive and important the fact finding func-

36. *Id.* at 158-59.
37. *See, e.g.,* Baker v. Downey City Bd. of Educ., 307 F. Supp. 517 (C.D. Cal. 1969).
38. Tate v. Bd. of Educ. of Jonesboro, Ark. Special School Dist., 453 F.2d 475 (8th Cir. 1972).
39. Linwood v. Bd. of Educ., City of Peoria, 463 F.2d 763 (7th Cir. 1972), *cert. denied,* 409 U.S. 1027 (1972). The hearing in *Linwood* involved the expulsion of a student. It was held before a local attorney who had been appointed as a hearing officer. A court reporter was present and the student was represented by counsel with cross-examination of adverse witnesses allowed.
40. *See* Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961).

tion of the hearing becomes.[41] As the court in *Bett v. Board of Education, City of Chicago*[42] stated:

> Since the student admitted setting false alarms [the misconduct with which she was charged] the function of procedural protection in insuring a fair and reliable determination of the retrospective factual question whether she in fact did it is not essential.[43]

The student need not admit his wrongdoing for the fact finding aspect of the hearing to become less important.

The classical situation arises when the misconduct takes place in front of the school official vested with the authority and duty to discipline the students. Here, a determination of the facts and whether the student violated the rule would be a needless step in the disciplinary process.[44] This, however, is not the typical situation. Rather, in the usual situation the misconduct will take place in front of other students, teachers, or go unobserved. In this context, the disciplinarian will not have firsthand knowledge of the facts and the fact finding aspect of the hearing is of utmost importance and requires a more formal approach.[45]

Another type of activity which may result in suspension or expulsion arises in connection with a student's off-campus conduct. A factual situation presented in several cases involves demonstrations by students off campus resulting in their arrest.[46] Basing a suspension or expulsion on the mere fact of an arrest, does not meet the due process requirement of a fact finding hearing because so doing assumes that the conduct which resulted in the arrest was of a type which school officials have authority to punish even though it did not take place on campus. In each of the situations mentioned above a transmission of facts or evidence to the disciplinary officials must occur. The accuracy of the transmission and the credibility of the person transmitting the information raises issues which can only be adequately tested if the student has an opportunity to present his side of the story.[47]

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41. *See, e.g.*, Bett v. Bd. of Educ. of the City of Chicago, 466 F.2d 629 (7th Cir. 1972).
42. *Id.*
43. *Id.* at 633.
44. *See* Farrell v. Joel, 437 F.2d 460 (2d Cir. 1971).
45. De Jesus v. Penberthy, 344 F. Supp. 70 (D. Conn. 1972).
46. *See* Dixon v. Alabama State Bd. of Educ., 294 F.2d 450 (5th Cir. 1961); Hobson v. Bailey, 309 F. Supp. 1393 (W.D. Tenn. 1970).
47. The need for some type of fact finding hearing is revealed all too clearly in the case of Strickland v. Inlow, 485 F.2d 486 (8th Cir. 1973), *vacated* and *remanded*, 95 S. Ct. 992 (1975), where three students were suspended without a hearing for possession and use of intoxicating liquors. The students, in a homemaking class, "spiked" (24 oz. of malt liquor in a gallon and a half of punch) the punch being served at a school party.

Assuming the officials have firsthand knowledge or the student admits to the charges, the lack of disputed facts should not eliminate the need for a hearing. The hearing need not be as extensive as one requiring a fact finding, but it should at least provide the student with an opportunity to explain the circumstances surrounding the conduct.[48] Where the type of discipline resulting from the misconduct is discretionary, due process requires the student or parent have some opportunity to present a mitigative argument.[49]

The second function of a hearing is to determine the type of punishment appropriate in the factual context before the school official vested with the power to discipline.[50] Arising from this second function is the second factor in the determination of what procedure, *i.e.*, formality of hearing, will satisfy due process. As the sanction involved moves from a short suspension to expulsion, the nature of the hearing necessary to satisfy due process becomes more formal.[51] Accordingly, the same degree of formality will not be required in a case involving a two-day suspension as that involving expulsion.[52] Few courts have required a formal criminal-type

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The quantity of liquor involved was not presented to the school board. The board's action found no finding had been made that the punch was intoxicating, in fact, no evidence on that point was even before the board when it made its decision.

48. Bett v. Bd. of Educ. of the City of Chicago, 466 F.2d 629 (7th Cir. 1972). The court recognized that ". . . due process may also contemplate affording the plaintiff an opportunity to be heard on the question of what discipline is warranted by the identified offense." *Id.* at 633.

49. *Id.* at 629.

50. This official can be the classroom teacher, school principal, board of education or any one of the superintendents or assistant superintendents.

51. 463 F.2d at 768.

52. *Cf.* Shanley v. Northeast Independent School Dist. of Bexar County, Texas, 462 F.2d 960 (5th Cir. 1972).

> [T]he magnitude of a penalty should be gauged by its effect upon the student and not simply meted out by formula. [A] suspension of even one hour could be quite critical to an individual student if that hour encompassed a final exam that provides for no 'make-up.' *Id.* at 967 n.4.

While in some cases injustice may result from a less formal hearing concerning a suspension, the interest at stake must be balanced against the burden imposed on school officials if a formal hearing was required for short periods of suspension. *See generally*, Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970). "The sufficiency of procedures employed in any particular situation must be judged in the light of the parties, the subject matter and the circumstances involved." *Id.* at 856.

hearing even in expulsion cases.[53] Most courts dealing with expulsion have chosen to follow the type of hearing that was used in *Dixon,* one with no attorney present and no confrontation or cross-examination of adverse witnesses.[54] Those courts facing short-term suspension cases have found compliance with the due process clause in a variety of ways, including; a conference with the student or parent wherein an explanation is given,[55] partial compliance with *Dixon,*[56] full compliance with *Dixon,*[57] or no hearing held at all.[58]

The effect of *Dixon* was to bring to the attention of the courts and students that due process protection was needed and appropriate in school discipline proceedings. *Dixon* notwithstanding, there existed a need for a definitive resolution of the question of whether the right to a public education was a protected right under the due process clause, one which, in all situations, needed some type of procedural due process protection, not just in expulsion or long suspension cases.

### *Goss v. Lopez*: The Court Faces the School/Due Process Issue

Against this background, the United States Supreme Court handed down its five to four decision in *Goss v. Lopez* on January 22, 1975.[59] Mr. Justice White, writing the opinion for the majority, affirmed a lower three-judge ruling that students who were suspended without a hearing prior to suspension or within a reasonable time thereafter were denied due process of law.[60] The *Goss* case was brought as a class action with nine named plaintiffs. The named plaintiffs were Ohio public high school students who had been suspended from school for misconduct for up to ten days. The suspended students and the class they represented sought a declaration that the Ohio statute permitting such suspensions was unconstitutional and an order compelling school officials to remove reference to the suspension from the students' records. The Ohio statute provided in part that:

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53. *See* Linwood v. Bd. of Educ., City of Peoria, 463 F.2d 763 (7th Cir. 1972), *cert. denied,* 409 U.S. 1027 (1972).
54. 294 F.2d at 159.
55. Baker v. Downey City Bd. of Educ., 307 F. Supp. 517 (C.D. Cal. 1969). *See also* Madera v. Bd. of Educ. of the City of New York, 386 F.2d 778 (2d Cir. 1967).
56. *See* Pervis v. Lamarque Independent School Dist., 466 F.2d 1054 (5th Cir. 1972).
57. Banks v. Bd. of Pub. Instruc. of Dade County, 314 F. Supp. 285, 292 (S.D. Fla. 1970), *aff'd,* 450 F.2d 1103 (5th Cir. 1971).
58. Jackson v. Hepinstall, 328 F. Supp. 1104 (N.D.N.Y. 1971).
59. 95 S. Ct. 729 (1975).
60. Lopez v. Williams, 372 F. Supp. 1279 (S.D. Ohio 1973).

> [T]he principal of a public school may suspend a pupil from school for not more than ten days. Such . . . principal shall within twenty-four hours after the expulsion or suspension notify the parent or guardian of the child, and the clerk of the board of education in writing of such expulsion or suspension including the reasons therefore.[61]

The statute goes on to provide a procedure for appealing expulsions but no procedure is provided for suspended students. The appellate procedure consists of a hearing before the board of education. The misconduct for which the students were suspended arose out of racial unrest at Marion-Franklin High which for the most part consisted of disruptions during various assemblies and homeroom periods. Each student was summarily suspended with a letter being sent home to inform the students' parents of their suspension. It appears from the facts that in each case the official issuing the suspension had firsthand knowledge of the misconduct involved.[62]

The lower court held that the state-created entitlement to an education was a liberty protected by the due process clause of the fourteenth amendment.[63] Athough the court recognized that school officials are better suited to make decisions affecting their institutions, it nonetheless felt constitutionally bound to insure that the student be afforded the minimum procedural process mandated by the Constitution.[64] The court then set forth the minimum procedural requirements necessary to satisfy due process in the temporary suspension situation where a need for immediate removal of the student is presented. When such a need arises and the student is removed, the school must:

1. Send written notice of the removal to the student and parents of the reason(s) for the removal and the proposed suspension within twenty-four hours after removal.
2. Not later than seventy-two hours after the actual removal, the student and his parents must be given an opportunity to be present at a hearing before a school administrator who will determine if a suspension should be imposed.

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61. *Id.* at 1282.
62. *Id.* at 1284-91. There appears one exception to this in the case of plaintiff Betty Crome who was suspended after being arrested on her way home from school. The arrest occurred at a junior high at which Ms. Crome had stopped. She was released without charges being filed but the next morning received a letter informing her she had been suspended.
63. *Id.* at 1300.
64. *Id.* at 1301.

3. The hearing is not a judicial proceeding, but must provide at a minimum:
   a. statements in support of the charges;
   b. statements by the student and others in defense of the charges and/or in mitigation or explanation of his conduct;
   c. the administrator is not required to permit the presence of counsel or follow any prescribed judicial rules in conducting the hearing.[65]

The Supreme Court affirmed the lower court, at least in theory.[66] In doing so, however, it limited the procedure necessary to satisfy due process.

*Due Process is Required in School Disciplinary Proceedings*

The Court first turned to the issue faced many times before in the lower courts as to whether or not the due process clause applied to school disciplinary proceedings. The school officials contended that because there was no constitutional right to an education, the due process clause did not protect against expulsion from the public school system.[67] The Court first discussed the right to education as being a property interest.

> Protected interests in property are normally 'not created by the Constitution. Rather, they are created and their dimensions are defined' by an independent source such as the state statutes or rules entitling the citizen to certain benefits.[68]

Since the students had a legitimate claim of entitlement to a public education under Ohio law,[69] the Court held, "Ohio may not withdraw that right on grounds of misconduct absent fundamentally fair procedures to determine whether the misconduct has occurred."[70]

> [T]he State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that clause.[71]

Basing the student's property interest in education upon a state statute would appear to limit due process protection to students residing in states having compulsory attendance laws. This presents no problem except for students in Mississippi and South

65. *Id.* at 1302.
66. 95 S. Ct. at 729.
67. *Id.* at 735. *See also* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).
68. 95 S. Ct. at 735, *citing* Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
69. OHIO REV. CODE §§ 3313.48, 3313.64 (1974).
70. 95 S. Ct. at 736.
71. *Id.*

Carolina where no compulsory attendance exists.[72] Even as to these students, due process applies because the Court found that charges of misconduct resulting in suspension from school, if sustained and recorded, could "seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."[73] Referring to the due process clause protection of liberty, the Court found that where a person's good name, reputation, honor, or integrity was at stake because of governmental action, the minimum requirements of due process must be satisfied.[74]

*Minimum Procedures are Established*

Having found that the due process clause applied to the right to public education, the Court faced the question of what minimum procedures were necessary to satisfy the clause. School officials argued that due process did not come into play until a student was subjected to severe detriment or grievous loss.[75] The Court rejected the school's argument, turning to *Sniadach v. Family Finance Corp.*[76] for the proposition that as long as a property deprivation is not de minimis, its gravity is irrelevant to the question whether account must be taken of the due process clause. "A ten-day suspension from school is not *de minimis* in our view and may not be imposed in complete disregard of the due process clause."[77] The Court, finding that a fundamental requisite of due process of law was a hearing and being informed of that hearing, held a student facing suspension must be given *some* kind of notice and afforded *some* kind of hearing.[78]

72. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 112 n.68 (1973).
73. 95 S. Ct. at 736.
74. *Id.* The due process clause forbids arbitrary deprivations of liberty. Such deprivation may result where the student's school records reflect that he has been suspended. As noted by the Court, four of twelve randomly selected Ohio colleges specifically inquire of the high school of every applicant for admission whether the applicant has ever been suspended. *Id.* at 736 n.7. It is this type of blemish on the student's reputation which the Court seeks to protect by requiring minimal due process.
75. 95 S. Ct. at 736. *See also* Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951).
76. 395 U.S. 337, 342 (1969).
77. 95 S. Ct. at 737.
78. *Id.* at 738.

The procedures the Court found that would satisfy due process in the case of a suspension of ten days or less, consist of oral or written notice of the charges presented to the student and if he denies them, he must receive an explanation of the evidence the authorities have and an opportunity to present his side of the story.[79] The hearing need not be held prior to removal of the student. Such is the case where the student's presence poses a danger to persons or property. Likewise, if the student continues to disrupt the academic process he may be immediately removed from school.[80]

The Court did not find that the due process clause required the student be represented by counsel or to confront and cross-examine adverse witnesses, nor to call his own witness, at least in the case of a short suspension.[81] While not requiring these elements, the Court did not prohibit their use in the proper circumstances. It vested the school disciplinarian with the discretion to summon the accuser, permit cross-examination and allow the student to call his own witnesses. In more difficult cases the school disciplinarian may permit counsel.[82] In requiring the school official to afford the student notice and a hearing, the court sought to give the student an opportunity to alert the official to the existence of disputed facts concerning the misconduct. Where no disputed facts exist, the student should be given an opportunity "to characterize his conduct and put it in what he deems the proper context."[83] Finally, the Court specifically left open the possibility that longer suspensions or expulsions may require more formal procedures.[84]

### The Effect of *Goss*

In the eyes of the four dissenting justices,[85] the *Goss* decision represents an "unprecedented intrusion into the process of elementary and secondary education . . . ."[86] The practical effect of *Goss*, however, on daily school disciplinary proceedings will be insignificant.[87] While the court resolved the long-standing question

79. *Id.* at 740.
80. *Id. See also* Banks v. Bd. of Pub. Instruc. of Dade County, 314 F. Supp. 285, 291 (S.D. Fla. 1970) *aff'd*, 450 F.2d 1103 (5th Cir. 1971), where the court suggests a hearing prior to suspension in every case would itself have a disruptive effect on the educational process.
81. 95 S. Ct. at 740.
82. *Id.* at 741.
83. *Id.*
84. *Id.*
85. Justice Powell, Justice Blackmun, Justice Rehnquist and the Chief Justice.
86. 95 S. Ct. at 741 (dissenting opinion).
87. The *Goss* standard is not new to school officials. They voluntarily

of whether the due process clause was applicable to school discipline, the minimum standard established by the Court is too general to have any major effect on the schools. It is not suggested that the Court erred in its decision: quite the contrary. The recognition that a student faced with "short-term suspensions" is entitled to some type of hearing was long overdue. The Court, as the dissent points out, "[i]n its rush to mandate a constitutional rule, . . . appears to give no weight to the practical manner in which suspension problems normally would be worked out under Ohio law."[88] Likewise, it does not appear that the Court gave due regard to the numerous lower courts having faced the school discipline issue.

To reach the minimum standard established, the Court balanced the interest of the school officials against the interests of the student. School officials faced with numerous suspensions each year[89] cannot be required to provide a formal hearing prior to every suspension. Yet the student facing suspension is not concerned with the burden a hearing requirement has on school officials; his concern is focused on the omitted classroom instruction, the missed exams given during his involuntary absence, the voluminous amount of make-up work required to catch up with the class, and the effect the suspension will have on his opportunities to higher education and employment. Should the suspension be imposed erroneously, the student has suffered a great injustice, due in part to a policy which appears to favor less formality in school discipline.

The Court limits itself in its balancing process, finding on one hand that the risk of error resulting in unfair or mistaken expulsion from educational process is not all trivial. On the other hand, this risk should be guarded against, if it may be done without pro-

employ it in most situations. As pointed out by the district court, the usual procedures followed at Marion-Franklin High School, which the parties herein attended, involved a greater fact finding hearing than required by the court. Lopez v. Williams, 372 F. Supp. 1279, 1283 (S.D. Ohio 1973). The problem is not that school officials do not have the means or are not aware of the problems surrounding suspension cases. The problem is that officials do not always proceed in the "usual way" or "fair" way. If the officials at Marion-Franklin had, the students in *Goss* would probably not have been suspended.

88. 95 S. Ct. at 747 (dissenting opinion).

89. *Id.* at 745 n.10. "An amicus brief filed by the Children's Defense Fund states that *at least 10%* of the junior and senior high school students in the States sampled were suspended *one or more* times in the 1972-73 school year." *Id.*

hibitive cost or interference with the educational process.[90] Within this framework the Court finds equilibrium between the two interests in requiring the disciplinarian to seek out the student, obtain his side of the story and then render his decision on whether to suspend the student or not. As was pointed out by the Court:

> [F]airness can rarely be obtained by secret, one sided determination of the facts decisive of rights. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.[91]

The Court provides this instrument to the student in a most basic form: one where only the student is informed of the alleged violation, without knowing the identity of his accuser, and without means to seek review of the school officials' decision. While the Court's minimum standard may be adequate for suspensions of extremely short duration, in light of this potential harm to the student, it is not adequate for a suspension of longer duration.[92]

### An Expansion of *Goss*: A Proposed New Standard

If suspended for a short period of time, a student can make up missed lessons. Likewise, he is not so far behind his classmates as to place a burden on the teacher in helping him catch up. As the duration of the suspension increases, however, the potential harm to a student, in terms of missed lessons, becomes greater. As the potential harm to the student increases, the procedure essential to justify the harm should become more formal, and if necessary more burdensome on school officials.[93]

Many lower courts, in reviewing school discipline proceedings, adopted a test of basic fairness to determine whether the student was accorded due process.[94] A court must not lose sight of this goal of fairness when the balancing process is entered into. If, to insure fairness to the student, a formal hearing is required prior to a short suspension, then that result must be reached in the

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90. *Id.* at 739.

91. *Id., quoting from* Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 170-72 (1931).

92. *See* cases cited note 52 *supra*; *cf.* 95 S. Ct. at 743 (dissenting opinion).

93. The student absent from school for more than a couple of days faces several problems. First, he has missed foundational material upon which the lessons presented on his return are based. Second, he must make up work missed plus prepare the work assigned when his suspension ends. Interview with John Westrick, Principal of Lakeside Jr. High School, in Lakeside, California, March 11, 1975.

94. *E.g.*, Banks v. Bd. of Pub. Instruc. of Dade County, 314 F. Supp. 285 (S.D. Fla. 1970), *aff'd*, 450 F.2d 1103 (5th Cir. 1971).

balancing process. Attempting to balance two somewhat adverse interests and arrive at a fair result is not a simple task. The *Goss* Court set forth what it determined to be a procedure that would insure a fair result to the student without placing an undue burden on school officials. Using as a foundation the principles established in *Goss,* this commentator suggests a new minimum standard to counterbalance the potential harm which may result from a suspension.

The *Goss* Court held that prior to any suspension, the minimum procedure which it established must be followed. The Court left open the possibility that more formal proceedings may be required in certain circumstances.[95] A circumstance which would warrant a more formal procedure than the *Goss* standard is presented in the suspension of a student for a period in excess of three days.[96] There is no magic in the three-day cut-off period and it is recognized that attempting to establish a fixed time limit leads to many problems. However, for the sake of discussion, the three-day cut-off is adopted.

*The Initial Hearing*

Suspensions in excess of three days present a situation where the potential injury to the student increases each day absent from school. In such cases more is required by way of minimum procedures to satisfy the due process clause.[97] The school disciplinarian, faced with information of conduct which may warrant suspension of the student, must seek out and confront the student with the charges against him. If the student indicates the charges are accurate, he should be given an opportunity to explain his conduct if he so desires. If the student denies the charge or presents facts different from those first reported to the school official, the

95. 95 S. Ct. at 741.

96. *See* Dunn v. Tyler Independent School Dist., 460 F.2d 137 (5th Cir. 1972), where the court approved a school district regulation requiring written notice and a hearing for suspensions in excess of three days.

97. The *Goss* Court did not limit school officials to the minimum procedure it established. It expressly provided that once the disciplinarian is alerted to the existence of disputed facts "[h]e may then determine himself to summon the accuser, permit cross-examination and allow the student to present his own witnesses." 95 S. Ct. at 741. If in each case involving a greater than three day suspension, such a determination would, in fact, be made there would be no need for a new standard.

official must make two initial determinations. The first is whether the charges, if sustained, would result in a suspension of the student for a period in excess of three days. If it would not, the official has satisfied due process, having adhered to the *Goss* standard.[98]

If the possible suspension would exceed three days, the official must next determine if the student's continued presence at school would disrupt the educational process. In such a situation, the student may be immediately removed from school but a hearing must follow as soon as reasonably possible after the suspension.[99] Absent emergency circumstances, the student may remain at school until the individual who initially supplied the facts concerning the student's conduct can be summoned before the official. The two then should go over the initial report in light of the student's denial or statement of different facts. The student need not be present during this conference. At this point, the official, having confirmed the accusations after confronting the student and securing his statement, is free to resolve any discrepancies and determine whether to suspend the student or not.[100]

*Notice to the Parents of the Suspension*

One of the most essential requirements in any suspension situation and one which the majority in *Goss* failed to discuss, is notice of the suspension to the student's parents.[101]

In virtually all cases surveyed, notice of the suspension was given to the parents. The failure of the majority in *Goss* to require some type of notice to the parent that their child had been suspended and the reasons for same is a major shortcoming of the decision. As the dissent points out, the Ohio statute which the majority found unconstitutional required, "written notice including the 'reasons therefor' to the student's parents and to the Board of Education within 24 hours of any suspension."[102]

98. The fact that the suspension would not exceed three days does not limit the official to merely confronting the student. *See* Dunn v. Tyler Independent School Dist., 460 F.2d 137 (5th Cir. 1972).

99. Pervis v. Lamarque Independent School Dist., 466 F.2d 1054 (5th Cir. 1972).

100. It has been suggested that an impartial official should determine whether to suspend or not. *See* Linwood v. Bd. of Educ., City of Peoria, 463 F.2d 763 (2d Cir. 1971), *cert. denied*, 409 U.S. 1027 (1972); Farrell v. Joel, 437 F.2d 160 (2d Cir. 1971).

101. Notice should always be given to the child's parents when a suspension is issued against the student, no matter how short the suspension period is. *See* Hudgins, *The Discipline of Secondary School Students and Procedural Due Process, A Standard*, 7 WAKE FOREST L. REV. 32, 46 (1971).

102. 95 S. Ct. at 747 (dissenting opinion).

One explanation for the majority's omission to require such notice is that the notice to the parent is not necessary prior to the official conducting the fact finding hearing. This action would appear consistent with the majority's attempt to balance the respective interests of the parties within its appointed framework of noninterference with the educational process. Balancing the benefit the student might receive from having his parents present at the initial fact finding hearing with the tremendous burden it would place on school disciplinary proceedings, the majority's lack of requiring same is consistent with due process and basic fairness. The student's parent would most likely have no knowledge of the facts surrounding the alleged wrongful conduct. The main function of informing the parents of the suspension is to insure that the established due process procedures are followed in the school official's determination to suspend the student.[103]

*Review of the Initial Proceeding*

The problem of denial of due process in school disciplinary proceedings is not that officials are unfamiliar with the procedures required under the due process clause, but rather the lack of regular application of these procedures.[104] One method which would help insure that procedural due process is complied with in any given situation is to provide the student with a means of attaining a review of the school disciplinarian's action.[105] In not all cases will review be necessary or desired by the student or his parents.[106] Accordingly, to require that a review be automatic in all cases would be a superfluous and wasteful practice. Where, however, the student is desirous of a review, it should be obligatory on the school district to provide same.

A de novo review is not contemplated.[107] To require the review-

103. Hudgins, *supra* note 101, at 47.
104. *See* discussion in note 87 *supra*.
105. It has been held that a statute authorizing suspension and/or expulsion is not unconstitutional because it fails to provide a right to appeal. The court held the student had a common law right of certiorari. Linwood v. Bd. of Educ., City of Peoria, 463 F.2d 763 (7th Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972).
106. *Cf.* Interview with John Westrick, *supra* note 93.
107. While it has been suggested in several cases that it is a proper function of the reviewing officer to review the sufficiency of the evidence presented in the fact finding hearing, such a review is not proposed here. *See*

ing officer[108] to redecide the merits of the case would create an undue burden on the educational process. The due process clause does not require that a student have two hearings on the merits. It only requires that due process be complied with initially. Accordingly, the determination to be made in a suspension of three days or less would be whether the school disciplinarian complied with *Goss*.[109] For suspensions in excess of three days the determination is whether the disciplinarian confirmed the accusation with the accuser after having confronted the student and obtained his version of the situation.

If a review is sought by the student, the school disciplinarian would be notified as would the reviewing officer. The notice to the reviewing officer from the student should contain his reason for seeking review, including the relevant facts of the case. The disciplinarian would prepare a statement setting forth the facts of the case and the steps taken, including names of all parties having knowledge of the facts.[110] The reviewing officer would then determine if the required due process procedure had been followed and decide the issue accordingly. Should a discrepancy in the two reports occur, the reviewing officer should contact all the material parties involved and resolve the conflict on the basis of his independent investigation.[111] In some cases the reviewing officer may find it necessary to call the parties before him to resolve the conflict. This would be necessary, if at all, only in cases of extreme conflicts in the evidence. Thus, the review would not place such a burden on school officials as to interfere with the educational process.

A review of the fact finding hearing is not a foolproof procedure.[112] Yet, it is anticipated the thrust of a review would insure

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Black Students of North Fort Myer Jr.-Sr. High v. Williams, 470 F.2d 957 (5th Cir. 1972).

108. This officer may be the assistant superintendent, a district administrator specifically appointed to review these cases, or the school board itself.

109. *Goss* did not limit the fact finding hearing to the minimum procedure established. Accordingly, it may be proper for the student or his parents to seek a review to determine if the disciplinarian abused his discretion by failing to employ a more formal hearing procedure.

110. The same information should be included in the notice to the parents informing them of the suspension. Thus the disciplinarian may as a matter of course send a copy of the notice to the reviewing officer at the time of parental notification.

111. *See* Lee v. Macon County Bd. of Educ., 490 F.2d 458 (5th Cir. 1974). "Formalistic acceptance or ratification of the principal's request or recommendation . . . without independent Board consideration . . . is less than due process." *Id.* at 460.

112. *Cf.* Sullivan v. Houston Independent School Dist., 475 F.2d 1071 (5th

fair play at the school level. With notification to the parents being mandatory, the school disciplinarian will be put on notice that his action will be subject to the parents' review. If questions concerning the "fairness" of the procedures involved in the suspension arise in the parents' mind, their right to seek a review increases the effectiveness of the coercive value of the review procedure.[113]

## CONCLUSION

The *Goss* decision, by ending the debate concerning the applicability of the due process clause to school disciplinary proceedings has brought a degree of stability and certainty to the law of student rights. The student after *Goss* can expect that prior to any suspension being imposed upon him, he will have an opportunity to present his side of the story. While the Court directs its efforts towards the prevention of unfair and mistaken suspensions, it does not go far enough.

Working within the same limiting framework imposed by the Court prior to establishing its minimum standard, this commentator proposes a new standard. This new standard is directed at the suspension with a duration in excess of three days. Based on the increased harm which may result from greater absence from school, additional safeguards must be employed to prevent mistaken suspensions. A main goal of the proposed standard is to transform the expectancy of due process under *Goss* into a reality. By requiring notice of the suspension and the grounds upon which it is based be sent to the parents and the right to seek a review of the school disciplinarian's action, this transformation can be accomplished.

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Cir. 1973), where the court found that two subsequent de novo hearings with counsel present cured the lack of due process in the initial suspension proceeding.

113. *See* Hudgins, *supra* note 101.